Supreme Court, U.S.
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No. ——

IN THE
Supreme Court of the United States
OCTOBER TERM, 1998

PATRICIA MCCAFFREY, GERALD HILL, RON LUNDY,
Petitioners,

v.

OONA R.- S.,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Can individual public school employees, claiming qualified immunity, be sued through the vehicle of 42 U.S.C. Section 1983 for a failure to prevent the sexual harassment of a student in violation of Title IX of the Education Amendments of 1972, an issue upon which the Courts of Appeal are in conflict.

Whether the standards of liability under Title VII, which prohibits discrimination based on sex in the employment context, are an appropriate analogue for determining liability for sex discrimination in violation of Title IX, as to which the Courts of Appeal are in conflict.

For purposes of qualified immunity, whether this Court's decision in *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992) (holding that money damages are an appropriate remedy under Title IX) clearly established that individual public school employees can be held liable under Title IX for hostile environment sexual harassment of a sixth grade student by third parties.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Patricia McCaffrey, Gerald Hill, and Ron Lundy (collectively "Public School Employees") respectfully request that a writ of certiorari be issued to review the Order of the United States Court of Appeals for the Ninth Circuit entered on May 5, 1998, in order to resolve conflicts between the circuit courts of appeal on the important issues here presented.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Ninth Circuit in *Oona R.-S. v. McCaffrey,* No. 95-16046 (M. Schroeder, J.), is reported at 1998 WL 216944 (9th Cir.). It is reprinted in Appendix A hereto (App. A) at page 1a. The opinion of the District Court

in *Oona R.-S. v. Santa Rosa City Schools,* No. CV-94-0623-TEH (T. Henderson, J.), is reported at 890 F.Supp. 1452 (N.D. Cal. 1995). (App. C).

STATEMENT OF JURISDICTION

The Order and Opinion of the United States Court of Appeals for the Ninth Circuit ("Ninth Circuit") was entered April 24, 1998, and amended May 5, 1998. The Ninth Circuit denied a timely petition for rehearing and suggestion for rehearing *en banc*.[1]

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). Original jurisdiction of the District Court was invoked by respondent under 28 U.S.C. § 1343 and § 1367(a).

STATUTORY PROVISIONS INVOLVED

Title IX of the Education Amendments of 1972 (20 U.S.C. §§ 1681, *et seq.*) ("Title IX") provides, in relevant part, "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a).

42 U.S.C. § 1983 provides: "Every person who, under color of any statute, ordinance, regulation, . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. . . ."

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[1] The text of the Order (App. A, p. 2a) states that the Public School Employees' Petition for Rehearing was denied and suggestion for rehearing *en banc* was rejected; a separate order to this effect was never issued. However, a judgment affirming Judge Henderson's Order was filed and entered on May 5, 1998, as amended. (App. B, p. 15a.)

STATEMENT OF THE CASE

The issues here presented affect every teacher and every administrator of public educational institutions receiving federal funding, from elementary level through higher education, and are of paramount importance. The fundamental issue is whether the employees of a public school, which receives federal funding, are immune from suit against them in their individual capacities for asserted violations of Title IX, based upon the doctrine of qualified immunity. The statute itself provides relief only against the recipient of the federal funding (in this case, the Santa Rosa School District, not a party to the petition herein). However, the Public School Employees have been sued pursuant to 42 U.S.C. § 1983 ("Section 1983") for the identical conduct which comprises respondent's Title IX claim: hostile environment sexual harassment by third parties. The Section 1983 cause of action, whose components include both Equal Protection and Title IX, necessarily mandates an analysis of the school employees' defense from liability under the doctrine of qualified immunity, an issue which must be resolved at the earliest opportunity. *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

The analysis required to determine whether qualified immunity bars respondent's Section 1983 cause of action is set forth in *Siegert v. Gilley,* 500 U.S. 226, 232-233 (1991). The first step of the analysis is to determine whether the underlying substantive statute (Title IX) creates rights enforceable against the Public School Employees under Section 1983. The Ninth Circuit's resolution of this issue presents an intolerable conflict between the circuits.

Once the first determination has been made, the next step is to determine whether the law had been clearly established by the 1992-1993 school year (the time frame in which respondent's underlying allegations were stated

to have occurred) that the Public School Employees' failure to prevent teacher-student or student-student harassment is violative of Title IX. The circuits are hopelessly split in their analysis of this issue and the issue whether Title VII (42 U.S.C. § 2000e-2) is an appropriate analogue with respect to both teacher-student and student-student harassment.

A. Factual Background

Oona R.-S. ("respondent") was a sixth grade student at J.C. Fremont Elementary School in the Santa Rosa School District in Sonoma County, California, during the 1992-1993 school year. In February 1994, respondent filed a complaint in Federal Court alleging that she was subjected to sexual harassment for a period of two months by a student teacher, Drew Ibach,[2] who was removed from the school within three weeks of receiving the complaint by respondent; she also alleges a sexually hostile environment created by the male sixth grade students in her classroom throughout the school year.[3]

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[2] Under California law, institutions of higher education that conduct a program of professional preparation for a teaching credential are encouraged to operate and supervise professional preparation programs, including student teaching, and school districts are encouraged to cooperate with public and private institutions of higher education in the operation of the professional preparation programs so described. Cal. Educ. Code §§ 44203, 44320; Cal. Admin. Code tit. 5 § 80413 (1997). Pursuant to this legislative directive, the Santa Rosa School District allows placement of these students as volunteers into classrooms around the district; these "student teachers," like Drew Ibach, are not employees of the District.

[3] A more exhaustive description of the allegations is contained in the District Court Opinion, 890 F.Supp. at 1456-57, App. C, pp. 17a-23a. The Order appealed from disturbingly includes an inflammatory fact within its summary which appears *nowhere* in the complaint: the statement that Ibach allegedly "kissed" respondent and other girls. For this reason, the Public School Employees refer this Court to the District Court opinion's summary of facts, rather than the Ninth Circuit's embellished rendition of the facts.

During the 1992-1993 school year, petitioner McCaffrey was respondent's sixth grade teacher; petitioner Gerald Hill was the Principal of J.C. Fremont Elementary; and petitioner Ron Lundy was the Director of Elementary Education for the School District. None are alleged to have personally participated in any sexually harassing conduct against respondent, but are alleged to have inadequately failed to prevent and respond to respondent's complaints in their supervisorial capacity over Ibach and the male sixth grade students.

Based upon respondent's allegations of teacher-student harassment and student-student harassment against her, the Public School Employees have been sued individually pursuant to Section 1983.

B. Procedural History

The Public School Employees filed a Motion to Dismiss pursuant to Federal Rules of Civil Procedure, Rule 12(b)(6), which, *inter alia*, sought to dismiss the individual Public School Employees from respondent's Section 1983 cause of action based upon a qualified immunity. On May 2, 1995, the United States District Court for the Northern District, Judge Thelton E. Henderson, denied the Motion to Dismiss. (App. C.) The Public School Employees appealed Judge Henderson's ruling, which was upheld by the United States Court of Appeals for the Ninth Circuit (3-0) in an amended opinion dated August 25, 1997.

The August 25, 1997, decision was predicated upon the holding of the Eleventh Circuit in *Davis v. Monroe County Bd. of Educ.*, 74 F.3d 1186 (11th Cir. 1996), *vacated and reh'g en banc granted*, 91 F.3d 1418 (11th Cir. 1996) (herein "*Davis I*"). *Davis I* held that a school board which knowingly permitted student-student sexual harassment created a hostile environment in violation of Title IX's mandate against discrimination based on sex. *Davis I* conflicted with a decision in the Fifth Circuit,

Rowinski v. Bryan Indep. School Dist., 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996). Acknowledging the conflict in the circuits, the Ninth Circuit adopted the reasoning of *Davis I*, and affirmed the lower court's denial of qualified immunity.

Eight days after the Ninth Circuit issued its opinion, the Eleventh Circuit reversed its holding in *Davis I* upon an *en banc* rehearing. *Davis v. Monroe County Bd. of Educ.*, 120 F.3d 1390 (11th Cir. 1997) (*en banc*) (*petition for cert. filed*, November 19, 1997) (herein *"Davis II"*). The *Davis II* court held that an entity is not liable under Title IX for failure to prevent student-student hostile environment sexual harassment, and declined to apply the standards of Title VII to Title IX. *Davis II*, 120 F.3d at 1399 n. 13.

Based upon the reversal of *Davis I*, the Public School Employees immediately filed a Petition for Rehearing with a suggestion for rehearing *en banc* in the Ninth Circuit, as the split in the circuits that was created by the *Davis I* opinion no longer existed. The Ninth Circuit denied the Petition for Rehearing but withdrew its earlier August, 1997, opinion and filed a new opinion (2-1, Hall, J., dissenting) amended on May 5, 1998, disregarding *both* the Fifth Circuit *Rowinski* and Eleventh Circuit *Davis II* holdings and predicating its decision solely on this Court's decision in *Franklin v. Gwinnett County Pub. Schools*, 503 U.S. 60 (1992), in denying the Public School Employees qualified immunity. The May 5, 1998 opinion is the subject of the present petition, as it has created a new conflict between the circuits.

REASONS FOR GRANTING THE WRIT

I. THERE IS AN INTOLERABLE CONFLICT IN THE CIRCUITS AS TO WHETHER SECTION 1983 CLAIMS ARE SUBSUMED BY TITLE IX

The Ninth Circuit's recognition of a cause of action against individual school teachers for failing to prevent sexual harassment by third parties is analytically defective. Further, in establishing a Section 1983 cause of action against the Public School Employees, its decision is in direct conflict with the Third and Seventh Circuits (*Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990); *Waid v. Merrill Area Pub. Schools*, 91 F.3d 857 (7th Cir. 1996)).

The Ninth Circuit, without any analysis, allowed a Title IX claimant to assert a Section 1983 claim against individual teachers for conduct identical to that comprising the claimant's Title IX cause of action. As discussed below, determining whether a valid federal claim is asserted at all is the first step of the *Siegert v. Gilley* analysis for qualified immunity.

Section 1983 is a statutory remedy which Congress may replace with an alternative remedy; "[t]he crucial consideration is what Congress intended." *Smith v. Robinson*, 468 U.S. 992, 1012 (1984). Section 1983 is a vehicle through which rights otherwise created by statute or constitution may be enforced. It is not a source of substantive rights. *Baker v. McCollan*, 443 U.S. 137, 144 n.3 (1978). When a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, the requirements of that enforcement procedure may not be bypassed by bringing suit directly under Section 1983; Congress' intent to preclude resort to Section 1983 need not be based upon express stautory provisions, but may be demonstrated where the alternative remedial scheme is sufficiently comprehensive. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453

U.S. 1, 20-21 (1980) (herein referred to as "the *Middlesex* doctrine").

A. Application of the Middlesex Doctrine to Title IX: *Pfeiffer v. Marion Center Area School District*

As early as 1990, the Third Circuit recognized that constitutional claims arising from conduct identical to that comprising an alleged Title IX violation were completely subsumed within the comprehensive remedial scheme of Title IX. In *Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d 779 (3d Cir. 1990), the Third Circuit considered the fundamental question answered by this Court in *Franklin v. Gwinnett County Pub. Schools*: are compensatory damages an available remedy for asserted violations of Title IX? The question was answered affirmatively by the *Pfeiffer* court, pursuant to a two-tiered analysis of Title IX. First, following this Court's guidance in *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), the court recognized that "Congress intended to create remedies in Title IX comparable to those available under Title VI." *Pfeiffer*, 917 F.2d at 787 (Title VI, codified at 42 U.S.C. § 2000d (1994), prohibits racial discrimination by recipients of federal funding). Applying the majority holding in *Guardians Ass'n v. Civil Service Comm'n of N.Y. City*, 463 U.S. 582 (1983), which found that compensatory relief is available for Title VI violations when *intentional* discrimination is present, *Pfeiffer* concluded that compensatory relief is available under Title IX as well. *Pfeiffer*, 917 F.2d at 788.

The second tier of the analysis in *Pfeiffer* dealt with the question whether the plaintiff's constitutional claims, there based on the Equal Protection clause of the Fourteenth Amendment, were subsumed by Title IX. Citing cases which applied the *Middlesex* doctrine and which held that Title IX provides a comprehensive remedial scheme (including the availability of compensatory damages pursuant to the *Pfeiffer* opinion itself), the *Pfeiffer* court affirmed

the district court's finding that the constitutional claims were subsumed by the *Middlesex* doctrine and Title IX's comprehensive remedial scheme. *Pfeiffer*, 917 F.2d at 789.

This Court granted *certiorari* in *Franklin v. Gwinnett County Pub. Schools* because of the conflict created between the Third Circuit's decision in *Pfeiffer* (finding compensatory damages were available under Title IX), and the Eleventh Circuit's decision in *Franklin v. Gwinnett County Pub. Schools*, 911 F.2d 617 (11th Cir. 1990) (finding no compensatory damages available) (*rev'd in part by Franklin*, 503 U.S. 60 (1992)). *Franklin*, 503 U.S. at 65. This Court ultimately adopted what was essentially the first tier of the *Pfeiffer* analysis, setting forth a nearly identical appraisal of the comparisons between Title IX and Title VI. The Public School Employees urge this Court to now expressly adopt the second tier of the *Pfeiffer* analysis, the application of the *Middlesex* doctrine to Title IX. This second tier conclusion aided the *Pfeiffer* court in determining that Title IX provides a comprehensive remedial scheme, including damages, thus supplanting potential concurrent claims brought pursuant to Section 1983.

B. The Third and Seventh Circuits Have Followed the Second Tier Reasoning in *Pfeiffer v. Marion Center Area School District*; the Sixth and Tenth Circuits Have Not

In *Williams v. School Dist. of Bethlehem, PA*, 998 F.2d 168 (3d Cir. 1993) (*cert. denied*, 510 U.S. 1043 (1994)), the plaintiff brought an action under Title IX and Section 1983 against a school district [4] for violations of the Equal Protection and Due Process clauses of the Fourteenth Amendment, when the district prohibited plaintiff (a male) from participating on the girls' field

[4] The plaintiff did not sue individuals pursuant to Section 1983 in *Williams*; thus, the issue of qualified immunity was not raised.

hockey team. The court, applying this Court's reasoning in *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. at 20-21, held that the constitutional claims were subsumed in Title IX, and precluded because they were based on matters "fully addressed by the comprehensive scheme in Title IX." *Williams*, 998 F.2d at 176 (*following Pfeiffer v. Marion Center Area School Dist.*, 917 F.2d at 789). *Williams* has been followed in cases involving alleged sexual harassment of students by teachers as well. *See Stilley v. Univ. of Pittsburg*, 968 F.Supp. 252 (W.D. Penn. 1996); *Seneway v. Canon McMillan School Dist.*, 969 F.Supp. 325 (W.D. Penn. 1997).

Similarly, the Seventh Circuit was asked to "consider the relationship between [Section] 1983 and Title IX" in a case brought by a teacher alleging both Title VII violations and intentional discrimination pursuant to Title IX and Section 1983. *Waid v. Merrill Area Pub. Schools*, 91 F.3d 857 (7th Cir. 1996). The Seventh Circuit followed the Third Circuit's mandate in *Pfeiffer v. Marion Center Area School Dist.*, and held:

> [A] plaintiff may not claim that a single set of facts leads to causes of action under both Title IX and [Section] 1983. [ ] In particular, a plaintiff may not claim that an instance of intentional discrimination simultaneously creates causes of action under Title IX and under § 1983 and the Equal Protection Clause of the Fourteenth Amendment; *the availability of a Title IX claim precludes the pursuit of a § 1983 claim. Waid*, 91 F.3d at 862 (emphasis added), *citing Williams*, 998 F.2d at 176.

While *Waid* did not involve a claim of sexual harassment by a student, its sound reasoning extends to all claims whose genesis is Title IX:

> The Third Circuit's approach to this question is persuasive, and we will follow it. By enacting Title

> IX, Congress created a strong incentive for schools to adopt policies that protect federal civil rights. If educational institutions do not adequately safeguard the civil rights of their students and employees, Title IX provides that they may lose the funds supplied by a myriad of federal agencies. *The creation of this incentive indicates that Congress intended to place the burden of compliance with civil rights law on educational institutions themselves, not on the individual officials associated with those institutions.* . . . This indication is strengthened by the fact that Title IX gives plaintiffs access to the full panoply of judicial remedies. The provision of these remedies suggests that Congress saw Title IX as the device for redressing *any grievance* arising from a violation of federal civil rights by an educational institution. *Waid*, 91 F.3d at 862-863 (emphasis added).

The Sixth and Tenth Circuits have rejected this notion. *Lillard v. Shelby County Bd. of Educ.*, 76 F.3d 716, 723-24 (6th Cir. 1996) (refusing to apply *Middlesex* doctrine to independently existing federal constitutional rights and finding Title IX contains no comprehensive enforcement scheme); *Seamons v. Snow*, 84 F.3d 1226, 1234 n.8 (10th Cir. 1996) (following *Lillard*, but recognizing that the Section 1983 claim could not be predicated on a violation of Title IX itself, as "such a duplicative effort would be barred").

The Public School Employees believe, as urged in the proceeding below, that the reasoning of the Third and Seventh Circuits applies.

Title IX contains a comprehensive enforcement scheme, and gives plaintiffs a "full panoply" of judicial remedies. *Waid*, 91 F.3d at 863. When a state official is alleged to have violated a federal statute which provides its own comprehensive enforcement scheme, no Section 1983 action will lie. *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. at 20. This Court recog-

nized in *Franklin v. Gwinnett County Pub. Schools*, that all available remedies could be pursued by private enforcement of Title IX. *Id.*, 503 U.S. at 72. The availability of a private right of action and unlimited remedies available thereunder demonstrate Congress' intent to foreclose Section 1983 suits to enforce the provisions of Title IX. *See Middlesex*, 453 U.S. at 20-21; *Pfeiffer v. School Bd. for Marion Center Area*, 917 F.2d at 789; *Bougher v. Univ. of Pittsburg*, 713 F.Supp. 139, 145 (W.D. Penn. 1989), *aff'd* 882 F.2d 74 (3d Cir. 1989).[5]

Given the intolerable conflict among the circuits that pervades decisions on this issue, this petition should be granted.

II. THE NINTH CIRCUIT'S OPINION DIRECTLY CONTRADICTS THIS COURT'S MANDATE IN *SIEGERT v. GILLEY* AND INVOLVES AN ISSUE WHICH HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THIS COURT

The Public School Employees are entitled to qualified immunity if the complaint fails to state a federal claim *or* if in light of clearly established principles governing their conduct, the Public School Employees objectively could have believed their conduct was lawful. *Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1996) (*en banc*) (*citing Siegert v. Gilley*, 500 U.S. at 232). The Ninth Circuit's failure to address the underlying question (whether a cognizable claim exists) represents a clear departure from the accepted and usual course of judicial proceedings, on an issue which has not been, but should be, settled by this Court; thus, *certiorari* is appropriate.

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[5] The District Court opinion dismissed these cases as pre-*Franklin* rulings. However, *Franklin* did not discuss whether Section 1983 was available as a vehicle to enforce Title IX, and therefore, the holding of *Franklin* did not affect the consensus of these cases that a Section 1983 action will not lie when that action is derived from alleged violations of Title IX.

A. *Siegert v. Gilley* Analysis Step One: Is There a Federal Constitutional or Statutory Right to Sue Individuals Under Section 1983 for Violations of Title IX

The decision below assumes, without any discussion or citation to authority, that the school employees can be sued for a Title IX violation through the vehicle of Section 1983. The Ninth Circuit's omission of the first step of the *Siegert* analysis (*see Siegert*, 500 U.S. 226, 232-233) has potentially far-reaching ramifications to *any* discussion of qualified immunity, and sets a dangerous precedent for qualified immunity jurisprudence in general.

The Ninth Circuit has routinely applied the *Siegert* analysis to interlocutory appeals based upon the defense of qualified immunity. It has repeatedly stated that the first step of such an analysis requires a determination whether the claimant has stated a cognizable federal claim in the first instance. *Armendariz v. Penman*, 75 F.3d 1311, 1318 (9th Cir. 1996) (*en banc*); *Allen v. Sakai*, 48 F.3d 1982, 1090 (9th Cir. 1994); *see also Branch v. Tunnell*, 937 F.2d 1382, 1386 (9th Cir. 1991). Despite this authority, the decision below fails to address the first step in its qualified immunity analysis when it assumes, without comment or authority, that violations of Title IX are enforceable against individuals through the vehicle of Section 1983. The Ninth Circuit panel, instead, focused on the second step of the *Siegert v. Gilley* analysis in deciding whether the law was clearly established in the 1992-1993 school year such that the Public School Employees could be held liable for peer sexual harassment.

In *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, this Court held that Title IX, through an implied private right of action, may support a claim for monetary damages against a District receiving federal funds if the District discriminates against a person based on sex. Since the *Franklin* decision was issued, the circuits have strug-

gled with understanding the full implications of the "private right of action" recognized in *Franklin*. Title IX, by its own terms, indicates that an implied private right of action for damages may be maintained, if at all, only against educational institutions receiving Federal financial assistance. No court has held that Title IX creates liability on the part of individuals. *Cannon v. Univ. of Chicago*, 441 U.S. at 695 n.17; *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988). In *Floyd v. Waiters*, 133 F.3d 786, 789 (11th Cir. 1998) (*petition for cert. filed*, April 20, 1998), the court explained that because the contracting party under Title IX is the grant recipient, a "Title IX claim can only be brought against a grant recipient [—that is, a local school district—] and not an individual." *Id.* (brackets in original) (*quoting Smith v. Metro. School Dist. Perry Township*, 128 F.3d 1014, 1019 (7th Cir. 1997) (*reh'g and suggestion for reh'g en banc denied*, Dec. 16, 1997) (*petition for cert. filed*, Mar. 16, 1998)).

The opinion below recognized that its jurisdiction was controlled by the only other Ninth Circuit opinion to address a Section 1983 cause of action arising from an alleged violation of Title IX: *Doe v. Petaluma City School Dist.*, 54 F.3d 1447 (9th Cir. 1995). However, the *Petaluma City* panel similarly declined to determine the underlying issue of whether an individual can be sued for a Title IX violation using the vehicle of Section 1983. *Id.* at 1449.

B. *Siegert v. Gilley* Analysis Step Two: Was the Law Clearly Established and Application of the Heightened Pleading Standard

Assuming, *arguendo*, the existence of a federal right to sue individuals under Section 1983 for violations of Title IX, then an essential subsidiary issue is raised regarding the second step of *Siegert v. Gilley* qualified immunity analysis: was the law clearly established in the 1992-

1993 school year such that the Public School Employees could be held individually liable for violations of Title IX because of failure to prevent teacher-student harassment and/or student-student harassment. Intentional discrimination under Title IX and alleged equal protection violations require a plaintiff to meet the heightened pleading standard. *Mendocino Environmental Center v. Mendocino County*, 14 F.3d 457, 460 (9th Cir. 1994) (heightened pleading standard applies to each defendant's claim of qualified immunity).

A related subsidiary question (Sup.Ct.Rule 14.1(a)) is whether the opinion below properly applied the heightened pleading standard announced by the Ninth Circuit in *Branch v. Tunnell*, 937 F.2d 1382 (9th Cir. 1991). The heightened pleading standard adopted by the Ninth Circuit in *Branch* requires respondent to state *nonconclusory* allegations, setting forth *evidence* of unlawful intent, in cases in which subjective intent is an element of the constitutional tort action. *Branch v. Tunnell*, 937 F.2d at 1386. Bare allegations of intent do not satisfy the standard adopted in *Branch*. "The allegations of fact must be specific and concrete enough to enable the defendants to prepare a response and where appropriate, a motion for summary judgment based on qualified immunity." *Ibid.* This Court has held that, as against municipalities, a form of heightened pleading is not required. *Leatherman v. Tarrant County Narcotics Intelligence and Coordination Unit*, 507 U.S. 163 (1993). In doing so, however, this Court declined to address the propriety of the heightened pleading standard as it applies to the allegations brought against individual defendants. *Id.* at 166-67.

Insofar as respondent's Section 1983 claim arises from an alleged violation of the equal protection clause as well as directly from Title IX, the allegations against the school employees fail to meet the heightened pleading standard. The decision below contains no analysis of the factual

allegations supporting the Section 1983 claims against the Public School Employees, except to reference the bare, conclusory allegation that "[h]ere, Oona alleges that defendants intentionally discriminated against [her] because of gender . . .". (App. A, p. 6a.) Although application of the heightened pleading standard was urged by the Public School Employees in every step of the procedural history concerning their motion to dismiss, it was not given any consideration by the Ninth Circuit.

III. THE NINTH CIRCUIT'S OPINION DIRECTLY CONFLICTS WITH THE ELEVENTH AND FIFTH CIRCUITS IN APPLYING TITLE VII STANDARDS TO TITLE IX CLAIMS

In holding that failure to prevent student-student harassment violates Title IX, the decision below is in direct conflict with the Fifth Circuit (*Rowinski v. Bryan Indep. School Dist.*, 80 F.3d 1006, 1016 (5th Cir. 1996), *cert. denied*, 117 S.Ct. 165 (1996)) and the Eleventh Circuit (*Davis II*, 120 F.3d 1390, 1406 (1997) (*en banc*) (*petition for cert. filed*, Nov. 19, 1997)). Both circuits explicitly refused to analogize Title IX to Title VII in determining whether school officials have a duty, pursuant to Title IX, to stop peer sexual harassment.

The Eleventh Circuit, in *Davis II*, relying on part on an extensive analysis of the legislative history of Title IX, concluded that Title IX was enacted under Congress' power to spend for the general welfare of the United States. *Davis II*, 120 F.3d at 1397-1398. As a Spending Clause enactment, Congress is required to give potential recipients of funding through Title IX unambiguous notice of the conditions they are assuming when they accept federal funding. *Pennhurst v. Halderman*, 451 U.S. 1, 17 (1981). *Davis II* concluded that a Title VII analogy, which is dependent upon agency principles in general, is

inappropriate for application in a school setting for a student-student harassment. *Davis II*, 120 F.3d at 1399 n.13.[6]

Similarly, the Fifth Circuit in *Rowinski* declined to apply a Title VII case analysis to a student-student harassment claim under Title IX for the proposition that a hostile environment created by students is prohibited discrimination under Title IX. *Rowinski*, 86 F.3d at 1016. *See also, Rosa H. v. San Elizario Indep. School Dist.*, 106 F.3d 648, 654-658 (5th Cir. 1997) (refusing to apply agency principles to context of Title IX); *Smith v. Metro. School Dist. Perry Township*, 128 F.3d 1014, 1026 n.12 (following *Rowinski*).

Without exception, the circuits applying Title VII standards to Title IX claims do so in reliance upon this Court's reference to a Title VII case within the *Franklin* opinion. Unfortunately, the reference in *Franklin* to *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986) is routinely given far more importance and greater scope than warranted. Until the confusion among the circuits is resolved by this Court, the reference portends significant risk of substantial damage awards against public school districts.

The reference appears in this Court's brief discussion of points raised by the respondents in *Franklin* as to whether Title IX was enacted pursuant to the Spending Clause, and if so, whether the remedies were limited to those situations where the violations were unintentional. In rejecting this proposition, this Court stated:

> The point of not permitting money damages for an unintentional violation is that the receiving entity of federal funds lack notice that it will be liable for a monetary award. [Cite.] This notice problem does not arise in a case such as this, in which intentional discrimination is alleged. Unquestionably, Title IX

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[6] One of the Questions Presented in the Petition for Writ of Certiorari in *Davis II* is whether the Title VII analogy was appropriate (*petition for cert. filed*, November 19, 1997).

> placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and "when a supervisor sexually harasses a subordinate because of the subordinate's sex, that supervisor 'discriminate[s]' on the basis of sex." *Meritor Sev. Bank, FSB v. Vinson*, 477 U.S. 57, 64 [ ] (1986). We believe the same rule should apply when a teacher sexually harasses and abuses a student. Congress surely did not intend for federal moneys to be expended to support the intentional actions it sought by statute to proscribe. *Franklin*, 503 U.S. at 74-75.

Based on this reference to *Meritor*, cases have adopted Title VII jurisprudence to an alarming extent in Title IX cases. As correctly stated by the Seventh Circuit: *"Franklin* did not consider, much less hold, whether . . . agency principles in general should apply in Title IX cases." *Smith*, 128 F.3d at 1022.

Title VII prohibits sexual harassment as a form of sex discrimination by "employers." Title IX prohibits sex discrimination by "recipients of funds for a program or activity." However, the similarities between the statutes extend no further. *Smith*, 128 F.3d at 1023 (Title VII defines employers to include "any agent of such a person" (42 U.S.C. § 2000e(b)), while Title IX does not include such language). "Title VII and Title IX are worded differently. If Congress wished Title IX to be interpreted like . . . Title VII, Congress would have written Title IX to read like Title VII." *Davis II*, 120 F.3d at 1400 n.13.

In *Franklin*, this Court adopted *Pfeiffer's* reasoning that Title IX was patterned after Title VI. *Pfeiffer*, 917 F.2d at 787-88. This further suggests that the present split in the circuits should be resolved in favor of the position advocated by the Public School Employees: Title VII standards do not provide an appropriate analogue for claims brought pursuant to Title IX.

IV. FRANKLIN DID NOT CLEARLY ESTABLISH THAT INDIVIDUAL PUBLIC SCHOOL EMPLOYEES COULD BE LIABLE FOR MONEY DAMAGES UNDER TITLE IX FOR HARASSMENT BY THIRD PARTIES

The sole ground for the Ninth Circuit's denial of the Public School Employees' qualified immunity defense turns on a tangled and expansive reading of this Court's decision in *Franklin*. *Franklin* cannot be read so broadly.

Guided by its decision in *Doe v. Petaluma City School Dist.*, 54 F.3d at 1451, in which the Ninth Circuit held school officials' duties under Title IX were not clearly established in 1990, the majority decision below held: "Because *Franklin* was decided in February 1992, and the conduct here complained of began in October 1992, . . . the holding adumbrated by the majority in *Franklin* is required today: Title VII standards apply to hostile environment claims under Title IX. . . . Accordingly, we hold that the defendants are not entitled to immunity for their failure to take steps to remedy the hostile environment created by the male students in Oona's class." (App. A, p. 8a-9a.)

Franklin did not address either factual issue involved in this case (individual liability of school officials for harassment of student by a teacher or by other students). *Franklin* involved the availability of money damages against a district which knew that one of its agents was having coercive intercourse with a female student *over a two-year period*; individual liability and intermittent peer harassment were not issues. The Public School Employees are highly skeptical that an adumbrated holding of the *Franklin* decision is that the Public School Employees are not entitled to qualified immunity (also not an issue in *Franklin*) for claims brought against them.

The Ninth Circuit recognized in *Doe v. Petaluma City School Dist.*, that the first case to address peer harass-

ment at all was the District Court opinion appealed in *Petaluma City* in May of 1994. *Petaluma City,* 54 F.3d at 1450 ("In fact, this case appears to be the first in which a student has sought money damages for peer harassment from either a school or school official."). It went on to state: "If the law at [the time of the official's actions] was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful." *Id.* at 1450, *citing Harlow v. Fitzgerald,* 457 U.S. 800, 818 (1982).

Applying the analysis provided in *Petaluma City* to the facts of this case, there can be no liability against the Public School Employees for their alleged failure to prevent peer sexual harassment. Determining the relevant time frame is critical. The conduct in *Petaluma City* occurred prior to February, 1992, while the conduct alleged by respondent in this action occurred during the 1992-1993 school year. The only case discussing Title IX liability between February, 1992, and the end of the 1992-1993 school year was the Supreme Court decision *Franklin v. Gwinnett County Pub. Schools. Franklin* did not address this issue.

Even before the Ninth Circuit overturned the *Petaluma City* District Court decision in 1995, courts across the country found that a school official could *not* be held individually liable for failing to prevent peer harassment. *See Aurelia D. v. Monroe County Bd. of Educ.,* 862 F.Supp. 363, 367 (M.D. Ga. 1994) (*aff'd* 120 F.3d 1390); *Rosa F. Garza v. Galena Park Indep. School District,* 914 F.Supp. 1437 (S.D. Tex. 1994). During the 1992-1993 school year, there was no clearly established law which could have apprised the Public School Employees of a duty to intervene on respondent's behalf to prevent peer harassment.

By a 2-1 decision, the Ninth Circuit stands alone in imposing a threat of liability on public school employees. The majority of federal appellate justices have declined to place such burden on our nation's public educational system, recognizing the far-reaching and potentially devastating impact such liability would visit upon this institution.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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